IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6867 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

FIROZ @ PIRMOHMAD @ PIRIYO GOSMOHMAD SHAIKH : Petitioner.

Versus

COMMISSIONER OF POLICE : Opponents.

Appearance:

MS DR KACHHAVAH for Petitioner

Mr. S.P. Dave, APP for Respondent No. 1, 2, 3

CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 18/11/97

ORAL JUDGEMENT

The petitioner has been detained under the detention order passed by the Police Commissioner of the city of Ahmedabad on 1st May 1997 invoking Section 3(1) of the Gujarat Prevention of Anti-social Activities Act, 1985, (hereinafter referred to as the `Act'). The petitioner by this application under Article 226 of the Constitution of India,challenges the legality and validity of the said order.

2. The facts which led the petitioner to prefer this application may in brief be stated. Against the petitioner four complaints came to be lodged with different police stations in the city of Ahmedabad. First complaint was lodged before Kagdapith police station for the offences punishable under Section 457, 380 read with Section 114 of Indian Penal Code. The second complaint which came to be lodged before the Ellisbridge police station was with regard to the offences punishable under Section 379 read with 114, Indian Penal Code. The third complaint that came to be lodged with the Gaekwad Haveli police station, was with regards to the offence punishable under Section 397, I.P.C. and the last complaint also came to be lodged with the same police station for the similar offence. The Police Commissioner having come to know about the aforesaid four complaints after inquisition could see that the petitioner was fierce, subversive, chaotic, atrocious, riotious, yahoo, self-willed and head-strong person and was striking terror in the society by his nefarious activities. He was threatening the people who were not ready to bend his way. He used to rush to the people taking knife or the weapon and cause injury or extort money or cause self-willed wrongs. Some of the statements of the witnesses were also recorded and the Police Commissioner was then satisfied that the petitioner being dangerous person the people had cultivated a feeling of impending danger to their safety at any time, and were feeling insecured. With the result maintenance of public order was extremely difficult. The general laws to curb his wrongs were sounding dull and so detention was the only remedy. He therefore passed the impugned order on 1st May 1997. The petitioner at present is detained pursuant to that order.

3. Challenging the order, the petitioner has submitted that there is no material on record which would justify his being branded as subversive or`dangerous person' by the detaining authority. The case on hand would fall within the ambits of "law and order" and not within the ambits of "maintenance of public order". Lastly it was submitted that particulars about the witnesses giving the statements ought to have been given to him because there was no just cause to exercise the privilege conferred by Section 9(2) and withhold the particulars. It be stated at this stage that at the time of hearing, the learned advocate representing the petitioner waived all other grounds and confined to the ground namely, non-disclosure of material facts under the guise of the privilege under Section 9(2) of the Act. I will therefore confine to the ground on which the order

is sought to be assailed.

4. It would be better if the law about the non-disclosure of certain facts is elucidated. Reading Article 22(5) of the Constitution of India, what becomes clear is that the grounds on which order of detention has been made are required to be communicated to the detenu and further an opportunity of making the representation against the order of detention is required to be given. The detenu is therefore required to be informed not merely factual inference and factual material which led to inference namely not to disclose the certain facts but also the sources from which the factual material is gathered. The disclosure of sources would enable the detenu to draw the attention of the detaining authority in the course of his representation to the fact whether the factual material collected from such sourses would be relied upon and used against him on the facts and circumstances of the case. Subject to the limitation mentioned in Article 22(6) of the Constitution of India and Section 9(2) of the Act the detaining authority is empowered to withhold such facts and particulars the disclosure of which he considers to be against the public interest. The privilege of non-disclosure has be exercised sparingly and in those cases where public interest dictating non-disclosure overrides the public interest requiring disclosure. Hence the detaining authority must be fully satisfied on the basis of overall study that the apprehension expressed by the informant is honest, genuine and reasonable in the circumstances of the case. With a view to satisfy itself whether the fear of violence and consequential feelings of insecurity or apprehension of a wrong would be done to them at any time by the detenu by those making statement against the detenu is imaginary or fanciful; or an empty excuse or well-founded for disclosing or not disclosing certain facts or particulars of those persons the authority making the order has to make necessary inquiry personally. What can be deduced from such constitutional as well as legal scheme whereunder obligation to furnish the grounds and the duty to consider whether the disclosure of any facts involved therein is against public interest are both vested in the detaining authority and not in any other. The authority passing the order of detention has to apply his mind and should itself be satisfied to the question whether or not the supply of the relevant particulars and materials would be injurious to the public interest. If he mechanically endorses or accepts the recommendation of an outside or inferior authority in that behalf the exercise of power would be vitiated as arbitrary. What is further required

is the detaining authority must file his affidavit to satisfy the court that he had sincerely and honestly applied the mind for the bonafide exercise of the powers about disclosure and privilege regarding non-disclosure so that the court can examine rational connection between the ground disclosed or not disclosed in public interest. If no affidavit explaining the exercise of the power is filed the court can infer against the detaining authority. If the affidavit is filed explaining the exercise of the power the other side may challenge the privilege exercised on the ground that the same is vitiated by factual or legal malafides. For my such view, a reference to a decision in the case of Bai Amina, w/o. Ibrahim Abdul Rahim Alla v. State of Gujarat and others - 22 G.L.R. 1186 held to be the good law by the Full Bench of this court in the case of Chandrakant N. Patel v. State of Gujarat & Others - 35 (1) [1994(1)] G.L.R. 761, may be made.

5. Reading the copy of the order with reasons produced at page 12, it appears clearly that the Police Commisioner making the detention order has not himself satisfied about the exercise of the privilege conferred. He has relied upon the report made by his subordinate to whom he had entrusted the task. To rule out the possibility of subordinate making mistake in reaching to particular conclusion, or having been misguided, the detaining authority has to inquire himself and personally satisfy himself that to avoid danger to the safety of the witnesses, certain facts are required to be withheld, which is not done. Further, about his bonafide satisfaction, no affidavit is filed. In view of the fact, it is clear that the authority passing the order has not satisfied himself about the exercise of the powers conferred under Section 9(2) of the Act. When that is so, the order is vitiated which can be termed bad in law & arbitrary, and cannot be maintained as the right to have effective representation is marred.

6. For the aforesaid reasons, the order of detention dated 1st May 1997, being illegal, is hereby quashed and the petitioner is ordered to be released forthwith if no longer required in any other case. Rule accordingly made absolute.

.....